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IN THE

Supreme Court of the United States

October Term, 1958

No. 825

DAVE FLEISCHER, Individually and as Trustee in dissolution of FLEISCHER STUDIOS, INCORPORATED, a Florida corporation,

Petitioner,

against

PARAMOUNT PICTURES, INC., PARAMOUNT PICTURES CORPORATION and FLAMINGO FILMS, INC.,

Defendants-Respondents,

and

A. A. P. INC., ASSOCIATED ARTISTS PRODUCTIONS, INC., U. M. & M. T. V. CORP., W. P. I. X., INC., DUMONT BROADCASTING CORPORATION, KING FEATURES SYNDICATE, INC., FLEISCHER STUDIOS, INCORPORATED, a New York corporation, MAX FLEISCHER, individually and as co-trustee with plaintiff of FLEISCHER STUDIOS, INCORPORATED, a Florida corporation,

Defendants,

and

ROBERT S. BENJAMIN and ARTHUR B. KRIM,

Respondents.

DEFENDANTS-RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Petitioner's Spurious "Questions Presented"

In the teeth of the rebukes by District Judges William B. Herlands and Edmund L. Palmieri, and by the Court of Appeals (per Chief Judge Charles E. Clark, Circuit Judge Leonard P. Moore and District Judge Ernest W.

Gibson), petitioner is continuing his "dreary and acrimonious" assault upon the integrity of respondents' counsel (to quote Chief Judge Clark, Petition p. 39). Ignoring the condemnation by the Court of Appeals of his strictures as "unjustified and unworthy" (*id.*, p. 42), and the 16 months in court already afforded petitioner on the merits of disqualification, petitioner has manufactured six "questions presented" (pp. 4-5), each premised upon a distortion of the actual record, and each wholly academic, for however the question were to be resolved, petitioner would still have lost on the merits of disqualification.

We shall not dwell upon Questions "1", "5" and "6", since they will be dealt with fully in the brief of former Judge Rifkind as counsel for the respondents involved in the proceedings initiated by petitioner before District Judge Palmieri while his motion to disqualify was pending before Judge Herlands. We note merely: In petitioner's latest assault, he sought a sweeping mandatory injunction rescinding a multi-million dollar stock purchase transaction between parties in no way involved in this litigation and having nothing to do with any conceivable subject matter of the instant lawsuit. The findings by Judge Palmieri (Blue Appendix to Appellant's Brief below, pp. 20a to 22a) spotlighted the impropriety of petitioner's tactics and, accordingly, equally illumine the branch of petitioner's vendetta against our firm involved in the disqualification proceedings. Judge Palmieri explicitly found that the Canons of Ethics had nothing to do with the challenged transaction, no canon was violated, petitioner was not even aggrieved, nor did he have any standing, individually, to police the bar, and to "unfairly and improperly, and without any benefit to plaintiff in the prosecution of his instant action, besmirch the reputation and impair the professional standing and livelihood of two honorable attorneys". (The quotation is from Finding 13; also Findings, 4, 7 to 12, inclusive of Blue Appendix to Appellant's Brief, pp. 21a-22a). Chief Judge Clark, in his

opinion dismissing the appeal from Judge Palmieri's decision, likewise stressed: "Indeed, the motion before Judge Palmieri involves no claim of right by plaintiff. The allegedly champertous transactions made the basis of that application caused no direct injury to plaintiff;" (Petition, p. 39).

Petitioner's Question 2 (Petition, p. 4) is wholly academic. Though the Court of Appeals disagreed on the question of appealability, nowhere in the 36-page Petition has room been found to disclose that all three judges below were in unanimous agreement that petitioner's strictures are unjustified and unworthy. Thus, Chief Judge Clark, speaking also for Judge Gibson, after referring to Judge Herlands' "most thorough and persuasive decision" (Petition, p. 40), expressly emphasized at the close of his opinion:

> "Even though the case thus cannot be accepted on the merits, we have necessarily had to explore them to reach our conclusion; and because conduct of members of the bar has been so severely questioned, we note our concurrence with the conclusions of the two district judges that respondents have done nothing improper. *The strictures are unjustified and unworthy.*" (Petition, p. 42; emphasis ours.)

Judge Moore, dissenting because he considered Judge Herlands' decision appealable, expressly stated that the decision should be affirmed. In this connection, Judge Moore said:

> "As to the merits of the motion to disqualify, the district court carefully and ably reviewed the facts. • • • Plaintiff has had his day (even many days) in court on the merits of disqualification. He has lost on the merits and properly so in my opinion. If there be merit to the principal litigation it should be pursued and disposed of without further delay."

In short, petitioner's academic grievance under Question 2 is that the Court should have unanimously affirmed

Judge Herlands' comprehensive 60-page decision (163 F. Supp. 548), instead of dismissing the appeal. But the result would have been the same: judicial condemnation of the unlawyerlike pattern of behavior of petitioner's counsel in manufacturing unjustified and unworthy strictures against respondents' attorneys.

Petitioner's Question 2 also falsely hypothesizes a "substantial relationship" between the present controversy and our firm's sporadic representation of a former Fleischer corporation *21* and *26* years ago—the ancient vintage of this prior representation is slighted in the Petition—in the teeth of Judge Herlands' detailed demonstration, approved by all three judges of the Court of Appeals, that these ancient matters had absolutely no relationship whatsoever to any issue in this case. Indeed, petitioner has suppressed virtually *in toto* Judge Herlands' scholarly 60-page decision for the obvious reasons that: (1) with painstaking analysis, Judge Herlands had meticulously rejected on the merits each lurid charge hurled by petitioner and his counsel;* (2) for page after page, the Judge had reviewed some of petitioner's counsel's devious maneuvers throughout this litigation (*e.g.*, 163 F. Supp. at 561-62, 565, 569); and (3) upon his comprehensive analysis of the entire record, Judge Herlands had concluded *inter alia* (*id*, p. 569):

> "*Plaintiff is unreliable and incredible as a witness so far as concerns his cross-motion.* Plaintiff has failed to sustain his burden of proof of establishing a prima facie basis for said motion.
>
> • • •
>
> "This time sequence casts a shadow upon the credibility and good faith of plaintiff in making this cross-motion to disqualify. *The Court is of the*

* In 7 affidavits and approximately 40 exhibits we fully documented petitioner's fabrications and irrelevancies (our White Appendix to Appellees' Brief, pp. 3 to 129, incl.). The instant Petition utterly ignores this mountain of documentation despite the space and emphasis devoted thereto in Judge Herlands' decision (163 F. Supp., e.g., at 557, 565-69).

clear opinion that the second cause of action of the amended complaint was added in an effort to truss up the previously made motion." (Italics ours.)

As we have already observed, all three judges below praised Judge Herlands for his comprehensive decision, and expressly registered their distaste with petitioner's shabby maneuvers.

Petitioner's Question 3 is specious. Judge Herlands' decision (163 F. Supp. 548) is the best refutation of petitioner's false premise that Judge Herlands tried "the merits of the case in chief"—by exposing petitioner's manifest bad faith, his unreliability and incredibility, and his utter failure to establish even a prima facie basis for his vitriolic attack (163 F. Supp. at 569).*

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* This Court's 5-4 opinion in *Smith* v. *Sperling*, 354 U. S. 91 (Petition, p. 23), is indeed remote authority to support petitioner's spurious Question 3. *Smith* was a derivative stockholder's suit based on alleged fraudulent waste of the assets of the corporation. The issue was whether the corporation should be realigned as a party plaintiff. A majority of this Court ruled that for purposes of federal diversity jurisdiction, alignment of parties is property determinable on the face of the pleadings and by the nature of the controversy. Since "it is plain that the stockholder and those who manage the corporation are completely and irrevocably opposed on a matter of corporate practice and policy" (354 U. S. at 98), the Court held that the corporation is to be treated as a party defendant. The irrelevancy of *Smith* to the case at bar requires no elaboration.

Nor is there truth to petitioner's statement that respondents have moved for judgment of dismissal on the merits based on Judge Herlands' decision (Petition, p. 24). The actual facts: We moved to dismiss the jumbled, unintelligible amended complaint for violating the requirements of Rules 8(a)(2) and 8(e)(1) of the Federal Rules, and alternatively to strike the scandalous allegations sprinkled therein. In our notice of motion, we referred to Judge Herlands' decision as *corroborating* the irrelevancy and impertinency of the extraneous scandalous matter. Patently, too, the motion for disqualification having failed, there is no excuse for the continued presence in the amended complaint of the claimed sporadic representations by our firm 21 and 26 years ago so confusingly dredged up by petitioner in his pleading (see e.g., our White Appendix to Appellees' Brief, fols. 91-93, 102, 110-116, 140-155).

Petitioner's Question 4 (Petition, p. 4) is in the realm of fantasy. We shall not burden the Court with repetition of our detailed factual presentation (White Appendix to Appellees' Brief, fols. 23-8, 34-6, 64-6, 105-9, 122-4) refuting all the distortions and fallacies involved in petitioner's continued labored—and confused—argument of "equitable servitude" (Petition, e.g., pp. 24-31) to the effect that an ancient 1932 license agreement with King Features Syndicate, pursuant to which "old" Popeye cartoons were produced, in some mystical fashion erased the pivotal May 24, 1941 contract *—nine years later—whereby the Fleischers, individually and corporate, relinquished all rights in said cartoons, including all characters contained therein or created or used therefor, and, explicitly, any interest in any proceeds arising from any distribution of the "old" Popeye cartoons, either on television or theatrically. Petitioner's statement that his fanciful theory was rejected by Judge Herlands purely because of a "false affidavit of Louis Phil-

* Petitioner's counsel had confessed, in his specification of petitioner's purported claims (our White Appendix to Appellees' Brief, Exh. EE, fols. 277-85), when there was no motive for obfuscation, that the issues herein are matters of law governed by a legal interpretation of the contract of May 24, 1941. In petitioner's moving affidavit on the motion for disqualification—made before all the distortions added in his later affidavit and amended complaint—petitioner again explictily acknowledged that "The issues between Paramount and myself are governed by contract dated as of May 24, 1941 and will be resolved more as a matter of law" (quoted by Judge Herlands in his decision, 163 F. Supp. at 562).

The cardinal fact—abundantly documented (our White Appendix to Appellees' Brief, e.g., Exhibits F, H, I, J, K, L, M, N, pp. 74 to 81) and explicitly underscored by Judge Herlands (163 F. Supp., e.g. at 565)—so thoroughly condemnatory of the motion for disqualification, is that the Fleischers and their corporation were represented with respect to every aspect of the May 24, 1941 transaction by the late N. William Welling, their regular personal attorney since virtually the inception of their corporate enterprise—and not by our law firm, Louis Phillips, nor by any other member or associate thereof. Typically, Mr. Welling's name was conspicuously omitted from every affidavit filed by petitioner and his counsel (see Yellow Appendix to Appellant's Brief, e.g., pp. 29a-41a, 83a-112a).

lips" (Petition, p. 25) is nonsensical. His theory was exploded by the very provisions of the May 24, 1941 contract —see, e.g., the Fleischers' explicit acknowledgment that after May 24, 1941, Paramount "shall have no further obligation after said date to make any payments whatsoever" to the Fleischers, whether as "advance payments, down payments or percentage or share of receipts, or otherwise" (our White Appendix to Appellees' Brief, fols. 34-6).

In this connection, the Petition (pp. 28-31) itself has quoted Judge Herlands' decisive answer to what he characterized as petitioner's obscure "novel interpretation of the May 24, 1941 contract" (163 F. Supp. at 557). Judge Herlands' scholarly analysis of this pivotal agreement was praised by all three judges of the Court of Appeals.*

Petitioner's reliance (p. 25 et seq.) upon *In re Waterson, Berlin & Snyder Co.* v. *Irving Trust Co.*, 48 F. 2d 704, is misplaced. There, the Court held that upon a music publisher's bankruptcy, the trustee in bankruptcy may sell the copyrighted songs, subject to the right of the composers to have them worked in their behalf and to be paid royalties *according to the terms of the contracts.* Plainly, this holding gives the petitioner no comfort whatsoever because, according to the very terms of the May 24, 1941 contract, the Fleischer corporation had surrendered *all* rights in the old cartoons, including specifically the characters created or used therefor and all royalties of any nature; consequently, the Fleischers have no interest which may effect the "equitable servitude" with which the instant petition is interlarded.

Corrected Statement of the Question Presented.

In the light of the actual record, the true question is: Where the petitioner has already had 16 months in court

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* Chief Judge Clark, speaking also for Judge Gibson, referred to Judge Herlands' analysis as "most thorough and persuasive" (Petition, p. 40). Judge Moore similarly stated that Judge Herlands "carefully and ably reviewed the facts" (*id.*, p. 44).

on motions for disqualification, and the district judges with precise reasoning rejected every accusation hurled by petitioner and his counsel, and the Court of Appeals, although dividing on the question of appealability, were unanimous in rebuking the petitioner and his counsel for making their unworthy motions for disqualification, is the question of appealability of the orders denying disqualification of such overriding importance as to warrant review by this Court, notwithstanding that the question herein is wholly academic, for however resolved, petitioner would still have lost on the merits of disqualification?

The petition is significant more for its omissions than its contents.

Confusion is the petitioner's stock in trade. The purported "Statement" (pp. 11-19) repeats, in a jumbled and almost incoherent fashion, the misstatements on which the petitioner constructed his vicious attack against respondents' counsel, while the overwhelming evidence to the contrary is completely ignored. Petitioner proceeds as if the mere naked allegations in his affidavits may be substituted for the many months of searching analysis by Judge Herlands of the entire record.

Nowhere does the petition mention:

(1) the actual nature of petitioner's jumbled 30-page pleading, studded with what Judge Herlands euphemistically called "lurid" accusations against our law firm (163 F. Supp. at 561).* Even with the benefit of the voluminous affidavits filed by petitioner and his counsel (Yellow Appen-

* E.g., see the petitioner's false charges in the amended complaint that Flamingo Films, Inc., is a funnel through which our law firm is "siphoning off" for its personal profit, petitioner's assets and properties (our White Appendix to Appellees' Brief, fols. 1-3). Petitioner, in his Appendix below, sedulously omitted these charges because they illustrate the degree to which he manufactured utterly unfounded accusations. The falsity of the charges was incontrovertibly demonstrated (our White Appendix to Appellees' Brief, fols. 195-203).

dix to Appellant's Brief, *e.g.*, pp. 28a-41a, 84a-112a), Judge Herlands found "the threads of plaintiff's argument" difficult to weave into even "a coherent thesis" (163 F. Supp. 560; also p. 557). Chief Judge Clark also noted: "[W]e are not told and are uncertain what the action is all about" (Petition, p. 39). The instant petition, which merely repeats virtually *haec verba* fragments of petitioner's affidavits, as a comparison with his Appendix below discloses, is no more intelligible;

(2) the actual nature of Judge Herlands' comprehensive 60-page decision which, point by point, exposed the hollowness of each lurid accusation fabricated against our law firm, primarily because the firm *21 and 26* years ago had sporadically represented a former Fleischer corporation in matters having absolutely no relationship whatsoever to the present controversy;

(3) the condemnation by the Court of Appeals (per Chief Judge Clark) of petitioner's and his counsel's strictures as "unjustified and unworthy" * (Petition, p. 42);

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* It is noteworthy that when petitioner's counsel, Gustave B. Garfield, applied to Mr. Justice Harlan for a stay of our pending motions to strike the scandalous pleading, which stay was denied, petitioner's counsel, characteristically, contended that our construction of Chief Judge Clark's opinion as criticizing his behavior in this case, was "a figment of a sick mind" (please see page 1 of rebuttal affidavit of Mr. Garfield, sworn to March 25, 1959, submitted to Mr. Justice Harlan). Upon the argument on April 13, 1959, of our motions before District Judge Palmieri, when the Judge expressed a similar interpretation of the opinion of the Court of Appeals, particularly in the perspective of Rule 11 of the Federal Rules of Civil Procedure, Mr. Garfield filed an affidavit, purportedly under 28 U. S. C. § 144, accusing the Judge of bias and prejudice. Judge Palmieri subsequently rejected Mr. Garfield's attack upon his integrity. It appears to be a routine procedure for Mr. Garfield to attack judges who dare to disagree with him. See Mr. Garfield's specious charges of bias and prejudice against [now Chief] Judge Sylvester J. Ryan of the District Court for the Southern District of New York, founded on Mr. Garfield's wildest conjecture—likewise rejected by the Court of Appeals in *Plotkin v. National Comics Publications, Inc., et al.*, 217 F. 2d 332, 333 (C. A. 2, 1954).

(4) Mr. Garfield first conceived his accusations against our law firm and launched the spate of abuse on the motion for disqualification because we had refused to submit to his proposal to forfeit our clients' right of priority to take petitioner's deposition (our White Appendix to Appellees' Brief, fols. 378-84, 156-60, 309-12, 357). In short, had we surrendered our right to priority—subsequently upheld by Judge Herlands (*id.*, fols. 388-96)—we would not have been the recipient of the torrent of lurid accusations;

(5) Mr. Garfield's previous frivolous petition in the Court of Appeals for a writ of mandamus against Judge Herlands, on the heels of the Judge's decision denying disqualification, wherein Mr. Garfield resurrected the order of Judge Herlands preserving respondents' priority of examination and haled the Judge into court to defend his routine, discretionary and manifestly correct discovery order (our White Appendix to Appellees' Brief, fols. 388-96). This frivolous petition was unanimously—and summarily—dismissed by the Court of Appeals for the Second Circuit on May 28, 1958;

(6) the amended complaint itself—as pointed out by Judge Herlands—was the product of trickery and shabby maneuvering by petitioner's counsel to "truss up" the pending motion for disqualification with a morass of new, scandalous fabrications (163 F. Supp. at 569);

(7) the battery of lurid and epithetical allegations against our law firm unleashed by petitioner and his counsel on the motion for disqualification, was but one step in their thoroughgoing pattern of harassment and vilification. See, *e.g.*, Mr. Garfield's other fantastic false charges against members of our firm, which were so decisively rejected by Judge Palmieri and which are dealt with in greater detail in the brief of Judge Rifkind as counsel for the respondents involved therein; and Mr. Garfield's novel motion to punish our senior partner, Louis Phillips, for a non-existent contempt, based solely on Mr. Garfield's fanciful and, as fully demonstrated by the affidavits of every

attorney who had been present, inaccurate version of a colloquy in connection with a mere application for an adjournment of a motion (Record, pp. 197-212)—which motion was thereupon withdrawn by Mr. Garfield (Yellow Appendix to Appellants' Brief, p. 3a);

(8) it appears, as exemplified by reported cases, to be a standard tactic of Mr. Garfield to move to disqualify his adversaries. We refer, for example, to Mr. Garfield's fantastic—and rejected—motion to disqualify the distinguished firm of Shearman, Sterling & Wright from prosecuting an action, and even seeking a dismissal of the action, upon the sole ground that Shearman and Sterling were dead (*U. S. Technical Research Corp.* v. *Delta Export & Import Corp. et al.*, 201 F. 2d 672, C. A. 2, 1953).

It is against this background of appellant's counsel's vendetta against his adversaries that we supply the corrected statement of the facts.

Corrected Statement of the Facts

The Petition's "Statement" (pp. 11-19), without further characterization, is a distortion of the basic background facts. We supply the actual record, revealing the true nature of the instant litigation—the legal interpretation of the May 24, 1941 agreement between the Fleischers and Paramount, as to which, incontrovertibly, the Fleischers were represented by their regular personal attorney, the late N. William Welling. All of the assorted ancient matters so misleadingly dredged up by the petitioner more than a score of years later, are demonstrably irrelevant.

From 1929 to 1941, pursuant to a series of contracts, Paramount distributed motion picture cartoons produced by a New York corporation called Fleischer Studios, Inc., and its Florida successor in interest similarly called Fleischer Studios, Incorporated. Pursuant to these contracts, Paramount advanced huge sums to the Fleischer corporations, enabling the corporations to pay substantial

salaries to Dave and Max Fleischer and to meet the heavy overhead and other operating expenses of the Fleischer studio. Paramount received a fee for distribution. From the distribution proceeds, Paramount was first to reimburse itself for its advances to the Fleischer corporations, and Paramount and the Fleischer corporations were to share the remainder, if any, according to the certain percentages provided for in the various distribution contracts (our White Appendix to Appellees' Brief, fols. 15-16).

By 1941 it had become apparent that the Fleischer Studios' operation was unsuccessful and in financial straits. Very heavy advances by Paramount were unrecouped. Max and Dave Fleischer were at loggerheads, and their feud was disrupting their operations (*id.*, fols. 17, 189-93). (The personal dispute between the Fleischers has continued to this day, as evidenced by Dave's charges of conspiracy, fraud and misappropriation against Max, personally, in the complaint and amended complaint herein, Record, pp. 2, 9, 11, 20, 141, 155-7, 170.)

Accordingly, on May 24, 1941, in order to avert complete disaster (our White Appendix to Appellees' Brief, fol. 191), Fleischer Studios, Incorporated and Paramount entered into the final agreement. This agreement was an "arms' length" transaction. The Fleischers were represented in every phase of the negotiations and execution of this transaction by the late N. William Welling, their regular personal attorney for many years, whose name was so conspicuously omitted from every affidavit filed by petitioner and his counsel. Paramount was represented by Bernard Goodwin of its legal department (see opinion of Judge Herlands, 163 F. Supp. at 556-7, 560, 562, 565, 567).

Since, as Judge Herlands emphasized, "all rights of plaintiff and the Fleischer interests must be traced to and through this May 24, 1941 agreement" (163 F. Supp. at 556), it merits fuller discussion. These are some of the basic provisions of this pivotal agreement:

(1) "[I]t clearly cancels all prior agreements with the Florida corporation and its predecessors" (163 F. Supp. at 556; our White Appendix, fol. 23; see also fols. 214-9).

(2) "Moreover, by force of the May 24, 1941 contract and a separate bill of sale, all rights to all cartoons produced to that date—including 'all characters contained therein or created or used therefor'—were transferred to Paramount" (163 F. Supp. at 557, our White Appendix, fols. 25-9, 64-5).

(3) By assignment dated December 23, 1941, pursuant to the May 24, 1941 agreement, Fleischer Studios, Incorporated, formally assigned to Paramount all of its rights under its agreements with King Features Syndicate, Inc., the copyright proprietor of "Popeye" (our White Appendix, fols. 41-2).

(4) Outstanding indebtednesses of the Fleischers to Paramount were reduced by many hundreds of thousands of dollars (*id.*, fols. 29-30).

(5) The Fleischer corporation was employed during the one-year period commencing May 24, 1941 to produce 12 "Popeye" cartoons, and a handful of other works, collectively referred to in the agreement as the "New Cartoons". Paramount continued to finance the Fleischers' operations. In connection with these "New Cartoons", Paramount was to receive 40% of the gross distribution proceeds as part of its fee for distribution. From the balance of 60%, Paramount was first to recoup its advances to the Fleischer corporation and thereafte share the proceeds equally with the Fleischer corporation (*id.*, fols. 30-1).

(6) As to these "New Cartoons", Paramount again was vested with full and complete title of the broadest scope, embracing "all parts and other material thereof", including "all characters contained therein or created or used therefor" (*id.*, fols. 32-3).

(7) By separate personal, letter agreement likewise dated May 24, 1941, Max and Dave Fleischer agreed that (a) all of their prior agreements with Paramount were cancelled, (b) after May 24, 1941, Paramount shall have no obligation to make any payments whatsoever to the Fleischers under any such cancelled agreement, whether as advance payments, down payments or percentages or share of receipts, or otherwise, and (c) explicitly reconfirmed the absolute character of Paramount's exclusive ownership in all of the films and related rights referred to in the simultaneously executed basic agreement between Paramount and the Fleischer corporation (*id.*, fols. 34-6).

Subsequent to the employment by Paramount of Fleischer Studios, Incorporated, to produce the said "New Cartoons", there was no improvement in the operations of Fleischer Studios. The war between Max and Dave Fleischer and the removal of the Fleischer Studio to Florida had destroyed the effectiveness of their business (*id.*, fols. 43, 185-93). Paramount was reluctant to finance further the Fleischers' unsuccessful operations. After distribution of the "New Cartoons" in the usual course of business, the very substantial advances to Fleischer Studios, Incorporated, remained—and still are—unrecouped (*id.*, fols. 51, 55-6). The prints and negatives remained in Paramount's vaults for many years, until they were made available for television exhibition.

Although the outstanding license agreements with the copyright proprietor of "Popeye", pursuant to which the "Popeye" cartoons were produced, withheld from the Fleischer corporation and Paramount any right to televise or cause to be televised these cartoons, Paramount realized moneys when King Feature Syndicate, Inc., the copyright proprietor of "Popeye" granted to a third party television rights in these cartoons because Paramount was the copyright owner of the film cartoons and owned the prints and negatives (*id.* fols. 57-62, 66-70). The academic nature of the entire instant litigation is revealed by the controlling

fact that even with the "windfall" of additional moneys realized through the deals relating to television, the indebtedness of the Fleischer corporation to Paramount still subsists, to a huge extent (*id. fols.* 51, 55-56).

Paramount's employment of the Fleischer corporation ceased on May 23, 1942—17 years ago. These intervening years are filled with documented acts indicating time and again that the accusations of skullduggery and fraud, so many years subsequently, leveled against our firm on the motion for disqualification, are specious afterthoughts for ulterior motives (we respectfully refer the Court to Judge Herlands' succinct summary of some of this significant evidence—as adduced in our opposition papers, 163 F. Supp. at 566-69).

On October 14, 1957, petitioner served his jumbled original complaint which defies any attempt at summary. The succeeding year and a half has been consumed by petitioner's "dreary and acrimonious" disqualification gambit, "which has so overwhelmed the substance of this litigation" (quoting from Chief Judge Clark's opinion below, petition, p. 39).

Additional corrections of the petition

As to the *Kallus* case—launched in 1938, 21 years ago (petition, p. 14 *et seq.*): petitioner's prolix erroneous and confusing picture of this wholly irrelevant ancient suit to recover an alleged agent's commission, was fully and meticulously corrected in our opposing papers (our white Appendix to Appellees' Brief, fols. 143-53, 345-51).

As to the license agreement of February 17, 1937, between the Fleischer corporation and King Features Syndicate (Petition, p. 14): Petitioner omits the crucial fact that in the negotiations "the Fleischer interests were represented by the Fleischers' personal attorney, the late N. William Welling • • • and *not* by Mr. Phillips" (opinion of Judge Herlands, 163 F. Supp. 548, at 557, 555; italics by the Judge).

Argument

The Petition, significantly, does not quarrel with Judge Herlands' scholarly exposition of the substantive law governing disqualification (163 F. Supp., at 551-53). Petitioner's sorry performance in failing to show any rational "substantial relationship" between what he himself had admitted to be the current issue, a legal construction of the May 24, 1941 agreement (p. 6, *supra*), and the irrelevant assorted ancient matters going back to 1932 which he so confusingly dredged up, underscored the hollowness of the lurid attack upon our firm. Petitioner richly deserved the rebuke below that his strictures are "unjustified and unworthy" (Petition, p. 42). A wealth of additional authorities corroborated the correctness of the rejection of petitioner's retaliatory cross-motion for disqualification (in addition to the authorities cited by Judge Herlands, 163 F. Supp., at 551-53, see, *e.g.*, *Shaw* v. *Bill*, 95 U. S. 10; *Gelders* v. *Haygood*, 182 Fed. 109 (Cir. Ct., S. D. Ga.); *Clayton* v. *Birdsboro Steel Foundry & Machine Co.*, 66 N. Y. S. 2d 676 (Sup. Ct., N. Y. Co.); *National Finance Co.* v. *Abernathy*, 66 S. W. 2d 358 (Texas Civ. App.); *Ferguson* v. *Alexander*, 122 S. W. 2d 1079 (Texas Civ. App.); *DeLong* v. *Miller*, 133 Cal. App. 2d 175, 283 P. 2d 762; *Gillet* v. *Gillet*, 269 Mich. 364; *Rowe* v. *Dyers*, 213 S. W. 2d 234 (Texas Comm. App.).

One final observation as to the applicable law. As Judge Herlands found (pp. 4-5, *supra*), the amended complaint manifestly was designed "to truss up" petitioner's motion by compounding the irrelevant, ancient representations with a morass of new scandalous attacks upon our firm—apparently upon the fanciful theory seemingly urged in the instant petition (Question 3, p. 4; also pp. 22-4) that the mere pleading of accusations, however unfounded, somehow bolstered petitioner's motion and prevented our firm from defending against the vitriolic assault (in this connection, see, for example, the demonstrably false, lurid

allegations that our firm is "siphoning off" for its personal profit, petitioner's assets and properties, p. 8, *supra* and fols. 1-3 of our White Appendix to Appellees' Brief).

Goodson v. *Smith*, 243 P. 2d 163 (Supreme Court of Wyoming), supplies appropriate additional condemnation of petitioner's misconception of the applicable law (p. 165):

> "This court would hardly be justified in saying that an attorney at law thus accused is helpless and defenseless and should be compelled to take a neutral attitude in such a situation, without resorting to every reasonable means to defend his honor and his integrity."

In our case, we submit, where concededly our firm and Louis Phillips did not represent Dave Fleischer, Max Fleischer or Fleischer Studios, Incorporated, on any aspect of the subject matter of this litigation, the May 24, 1941 agreement, and concededly our firm and Louis Phillips were never consulted by any Fleischer, individual or corporate, on any matter throughout the subsequent sixteen and one-half years, there is abundant justification for the holding that our firm and Louis Phillips are not disqualified to resist the baseless, irrelevant accusations leveled against them in petitioner's pleading.

Indeed, although petitioner invokes Canon 37 (Petition, p. 7), he deletes therefrom the following explicit provision:

> "If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation."

We further submit that the Petition's reference to an alleged "intramural controversy among the judges of the United States Court of Appeals, Second Circuit" as to the appealability of an order denying disqualification (Petition, p. 20, *et seq.*) is scant justification for the review sought by this Court, in the light of the actual opinions below, wherein both the majority and the dissenting judge were in unanimous agreement that petitioner's strictures against

our firm are unjustified and unworthy (*supra*, pp. 3-4). Petitioner's preoccupation, accordingly, with the issue of appealability is wholly academic. However this question were resolved, petitioner would still have lost on the merits of disqualification. Petitioner can scarcely be serious in urging that he is aggrieved because the lower court dismissed his appeals instead of unanimously affirming the decisions of the district judges.

Moreover, we submit, certiorari to this Court is not the proper remedy to resolve an alleged "intramural controversy" in one circuit. Petitioner could have requested a rehearing *en banc* by the Court of Appeals for the Second Circuit, within 15 days from the filing of the opinion below (Rule 25a of the Rules of the United States Court of Appeals for the Second Circuit). Petitioner filed no such petition for rehearing because, we believe, he realized that on the actual record any panel would have reached the same result: judicial condemnation of petitioner's and his counsel's scandalous assault upon respondents' attorneys.

CONCLUSION

The petition is singularly devoid of merit. Petitioner's "dreary and acrimonious" assault upon the integrity of respondents' counsel (to again quote Chief Judge Clark below, Petition p. 39) should be halted by the denial of a writ of certiorari.

Dated: April 30, 1959.

Respectfully submitted,

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SEYMOUR SHAINSWIT,
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